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BRIEF OF DEFENDANT IN ERROR.

Supreme Court of the United States.

OCTOBER TERM, 1895.

NO. 31.

THE WINONA AND ST. PETER LAND COMPANY,
Plaintiff in error.

vs.

THE STATE OF MINNESOTA.

In Error to the Supreme Court of the State of Minnesota.

PIONEER PRESS, ST. PAUL, MINN.

14,732.

Supreme Court of the United States.

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NO. 31.

WINONA AND ST. PETER LAND COMPANY,
Plaintiff-in-error,

vs.

THE STATE OF MINNESOTA.

BRIEF OF DEFENDANT-IN-ERROR.

The several assignments of error may, for the purposes of argument, be summarized as follows:

1. That the taxation of the lands in question is in conflict with section 10 of article 2 of the constitution of the United States in this, that it impairs the obligation of the contract existing between the Winona & St. Peter Railway Company in respect to the taxation of the lands of that company before the same are sold and conveyed.

2. That the Minnesota statute under which the taxation of the said lands was sought is in conflict with the fifth amendment to the constitution of the United States, in that it authorizes taxation without notice and affords the owner no opportunity to appear and be heard.

I.

The first assignment does not call in question or relate to any statute of Minnesota, but questions the taxability of the said lands.

The contention of the plaintiff-in-error is that the lands were at the time they were placed upon the tax-lists by the county auditor exempt from taxation by reason of the granting act of the territory of Minnesota, approved May 22, 1857. The provision of that grant at all material here is section 4 thereof, which is as follows:

"The said lands so granted shall be and are exempted from all taxation until the same shall have been sold and conveyed by said company. In consideration of the grant of land and other franchises and privileges hereby confirmed in and conferred on the Transit Railroad Company, the said company shall pay into the treasury of the territory or State of Minnesota three per cent upon all the gross earnings of said road, the amount of the gross earnings to be ascertained by the verified statement of the president and treasurer of said company, as hereinbefore provided for; and the said three per cent shall be so paid into the treasury of the territory or future State of Minnesota within sixty days after any portion of the said road shall be operated, and annually thereafter; and the same, when paid, shall be in lieu of all taxes whatever."

The same assignment was raised when this case was before the supreme court of Minnesota, but was not urged or discussed. It received, however, as will directly be seen, the consideration of the court.

The taxability of the said lands has been conclusively determined by the supreme court of Minnesota.

Under date of Oct. 31, 1867, said railroad company entered into a contract with one Danford M. Barney and others, which contract is commonly known as the "Barney Contract," and which appears *in extenso* on pages 28 to 36 of the Paper Book.

The question was presented to the supreme court of Minnesota in the case of *State* vs. *Winona & St. Peter Land Co.*, 21 Minn. 472, whether the Barney contract was such a sale and conveyance of the lands therein named as to subject them to taxation within the meaning of the language employed in section 4 of the act of 1857. The court therein reached the affirmative view, and among other things say:

"The object of the act was to secure construction of the road with the lands granted by congress for that purpose. The commutation for public burdens imposed upon property was one of the inducements held out to the company to undertake the enterprise. Were the property of the company to be taxed according to its as-

sessed value, while the road earned but little, and the lands were unsalable, it might be a very serious burden, the prospect of which might have prevented parties undertaking the construction and operating of the road; and so the tax is to be imposed not according to the assessed value of the company's property, but according to its ability to pay, that is according to the amount of its earnings. It was contemplated that the road would be constructed, and perhaps for a time maintained from the proceeds of the lands granted and also that it might be a considerable time before those proceeds could be realized by sales; and if, while unable to realize by sales, the lands were to be subject to taxes, the actual proceeds would be thereby diminished, and the ability of the company to construct and maintain its road, from such proceeds, proportionately impaired. To avoid this was manifestly the purpose of the exemption, and the exemption is to be extended only so far as is necessary to effect that purpose. It cannot be claimed that the company can sell or give to any other person the benefit of the exemption. Now when the company has sold the lands and realized the proceeds and retains no lien upon, nor actual interest in the lands, even though it retains the naked legal title only as trustee for the purchaser, it is a matter of indifference to its interests, and to its ability to operate the road, that the lands are taxed. If taxes are assessed, it need not pay them. If the lands are sold for the taxes, it loses nothing. In the case before us, if the exemption still continues, it continues not for the benefit in any way of the company, but solely and exclusively for the benefit of Barney and associates. If the exemption is preserved by the company retaining the naked legal title, as trustees for the purchasers, then it may, in effect, sell or transfer to another what was intended for its exclusive benefit and not for the benefit of its purchasers. No such result could ever have been intended in the act of 1857. We therefore conclude that the lands were sold and conveyed within the meaning of section 4 of that act by the contract with Barney and his associates, and that they are subject to taxation."

State vs. *Winona & St. Peter R. Co.*, 21 Minn. 478, 479.

The court cites in support of its decision the following cases:

Carroll vs. *Safford*, 3 How. 441.

Witherspool vs. *Duncan*, 4 Wal. 210.

The same question was again presented to the same court in 1888 in the case of *County of Brown* vs. *Winona & St. Peter Land Company*, 38 Minn. 397.

In the last-named case the defendant company sought to draw a distinction between that case and *State* vs. *Winona & St. Peter*

Rd. Co., supra, growing out of a controversy between the grantees in the Barney contract and their grantors as to the quantity of lands to which the former were entitled. Barney and his associates having brought suit against the railroad company in the circuit court of the United States to determine the question in dispute, and the final decree therein not having been entered until March, 1887, it was contended in *County of Brown* vs. *Winona & St. Peter Land Co., supra*, on behalf of the defendant, that there was no "sale and conveyance until the entry of the said decree." The question was, however, disposed of in the following language:

"The conclusion which the defendant insists upon, to-wit: That there was no sale and conveyance of the lands by the company, within the meaning of the exempting clause of the act granting the lands as it has been construed by this court, till the entry of the decree in the circuit court, does not follow. That decree created no rights: it only declared the rights created by the contract and existing prior to the commencement of the suit, and enforced them by compelling a conveyance of the legal title. The equitable title to the lands designated in the decree passed to the purchasers under the contract as soon as the title to them vested in the railroad company. The decree could not otherwise have been made. The existence of any misunderstanding between the parties as to the effect and extent of the contract and as to the specific lands covered by it, or as to the rights of the purchasers under it, did not affect the rights created by it. Nor did the bringing of the suit have any such effect. The only effect of the decree was to dispose of any misunderstanding as to what rights the purchasers had under the contract, to declare to what lands they were entitled, and to direct a conveyance of the legal title. The lands were, therefore, subject to taxation, as were those covered by the decision of this court referred to." (401.)

Again, the same question arose in *County of Brown* vs. *Winona & St. Peter Land Co.*, 39 Minn. 380, and the same determination was reached as in the prior cases.

Finally, in the case at bar, the same court declared the taxability of the said lands no longer an open question.

It cannot be successfully contended that the effect of the Barney contract was not to vest Barney and his associates with the complete ownership of the lands therein refered to.

The supreme court of Minnesota in construing section 4 of the act of 1857, hereinbefore quoted has defined the limitation of the terms "sold and conveyed" as therein employed, and say:

"We therefore conclude that the lands were sold and conveyed within the meaning of section 4 of that act by the contract with Barney and his associates, and that they are subject to taxation."

State vs. *Winona & St. Peter R. R. Co.*, *supra*.

But the contention of the plaintiff-in-error is untenable for another and an insuperable reason.

The respondent makes no claim that the lands while yet owned by the company were not exempt from taxation. Conceding, for the purpose of argument, that the lands were not taxable, but that the taxing officer, in a mistaken view as to his duty or authority, placed them upon the tax lists, and that his action was sustained by the courts of Minnesota, no case is then presented of the impairment of the obligation of a contract within the prohibition of the federal constitution. The act would not be distinguishable in principle from that of the taxation in any year, while the lands were yet the property of the company, of any piece or parcel of them. It would have been an act of injustice to the company and a judgment of the court sustaining it would have served to emphasize that injustice. But this court would have been powerless to redress it. As was said in *Knox* vs. *Exchange Bank*, 12 Wall. 379:

"We are not authorized by the judiciary act to review the judgments of the state courts because their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. If we did, every case decided in a state court could be brought here, when the party setting up a contract alleged that the court had taken a different view of its obligation to that which he held."

And, furthermore, as was said in *New Orleans Waterworks* vs. *Louisiana Sugar Co.*, 125 U. S. 18:

"In order to come within the provision of the constitution of the United States, which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired but it must have been impaired by a law of the state. The prohibition is aimed at the legislative power of the state, and not at the decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals.

"This court, therefore, has no jurisdiction to review a judgment of the highest court of a state, on the ground that the obligation of a contract has been impaired, unless some legislative act of the state has been upheld by the judgment sought to be reviewed. The general rule as applied to this class of cases, has been clearly stated in two opinions of this court, delivered by Mr. Justice Miller. 'It must be the constitution or some law of the state which impairs the obligation of the contract, or which is otherwise in conflict with the constitution of the United States and the decision of the state court must sustain the law or constitution of the state, in the matter in which the conflict is supposed to exist; or the case for this court does not arise.'"

This doctrine was affirmed in *St. Paul, Minneapolis & Manitoba Ry. Co.* vs. *Todd County*, 142 U. S. 282. Nor do we understand that what was said in *Mobile & Ohio Rd.* vs. *Tennessee*, 153 U. S. 486, militates against it in any respect. There the charter of the railroad company exempted its property from taxation for the period of twenty-five years. The supreme court of Tennessee adjudged the exemption clause to be void and no obstacle to the taxation of company's property. This court asserted its jurisdiction to determine whether a contract did, in fact, exist and whether a subsequent law impaired that contract. It was there said, quoting from *Jefferson Bank* vs. *Skilly*, 1 Black, 436, 443:

"Its (the supreme court) rule of interpretation has invariably been that the constructions given by the courts of the states to state legislation and to state constitutions have been conclusive upon this court *with a single exception*, and that is, when it has been called upon to interpret the contracts of states, 'though they had been made in the forms of law,' or by the instrumentality of a state's authorized functionaries, in conformity with state legislation. It has never been denied, nor is it now, that the supreme court of the United States has an appellate power to revise the judgment of a supreme court of a state whenever such a court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant to be one within the meaning of that clause of the constitution of the United States which inhibits the states from passing laws impairing the obligation of contracts. Of what use would the appellate power be to a litigant who feels himself aggrieved by some particular state legislation if this court could not decide, independently of all adjudication by the supreme court of a state, whether or not the phraseology of an instrument in controversy was expressive of a contract and within the protection of the constitu-

tion of the United States, and that its obligation should be enforced notwithstanding a contrary conclusion by a supreme court of a state?"

If the supreme court of Minnesota had, in construing the charter of the company, held the exemption clause therein for any reason void, or if a law had been passed subsequent to the granting of the charter, repealing, in effect, such exemption clause, and the supreme court of that state had sustained the repealing law, a case would have been presented clearly falling within the purview of the provision of the constitution now invoked by the plaintiff-in-error.

The defendant-in-error therefore respectfully submits that this court is without jurisdiction to review the judgment of the supreme court of Minnesota and that the writ of error should be dismissed, unless jurisdiction is acquired perforce of one or the other of the remaining assignments.

II.

The assignment based upon the fifth amendment (second assignment, page 15, of transcript of record) is not avaliable upon this appeal.

In *Barron* vs. *The Mayor and City Council of Baltimore*, 7 Peters, 247, the court say:

"The plaintiff in error contends that it comes within that clause in the fifth amendment to the constitution which inhibits the taking of private property for public use without just compensation. He insists that this amendment, being in favor of the liberty of the citizen, ought to be so construed as to restrain the legislative power of a state as well as that of the United States. If this proposition be untrue, the court can take no jurisdiction of the cause.

"The question thus presented is, we think, of great importance, but not of much difficulty.

"The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred on this government were to be

exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes.

"If these propositions be correct, the fifth amendment must be understood as restraining the power of the general government—not as applicable to the states. In their several constitutions they have imposed such restrictions on their respective governments as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no farther than they are supposed to have a common interest."

The same doctrine is announced in the following cases:

Withers vs. *Buckley*, 20 How. 84;

Davidson vs. *New Orleans*, 96 U. S. 97;

Kelly vs. *Pittsburg*, 104 U. S. 78.

In *Kelly* vs. *Pittsburg*, *supra*, it was said:

"As regards the effect of the fifth amendment of the constitution, it has always been held to be a restriction upon the powers of the federal government, and to have no reference to the exercise of such powers by the state governments. * * * We need, therefore, give the first assignment no further consideration."

III.

Without waiving the objection that there is no proper assignment whereby the statute of Minnesota can now be questioned, we shall assume, but merely for the purposes of the argument, that the plaintiff-in-error has rested its appeal in part upon the fourteenth amendment of the federal constitution.

The county auditor, in placing the lands upon the tax lists, acted pursuant to an act of the legislature of Minnesota, enacted in 1881, which is as follows:

"If any real or personal property shall be omitted in the assessment of any year or years, and the property shall thereby escape taxation, when such omission shall be discovered the county auditor shall enter such property on the assessment and tax books for the year or years omitted, and he shall assess the same and extend all arrearages of taxes properly accruing against such property with seven per cent interest thereon from the time said taxes would have

become delinquent and the same shall be extended against such property on the tax lists for the current year." (G. L. 1881, c. 5, sec. 1).

The above statute is designed to secure the taxation of omitted property and to authorize the county auditor to place it upon the tax lists and to assess it at its proper valuation.

As construed by the supreme court of Minnesota it is ineffectual, as already suggested, to authorize the exaction of either interest or penalties.

The several objections urged against the statute by the plaintiff-in-error may be summed up in this, that it authorizes the county auditor to arbitrarily assess property without adequate opportunity afforded the owner to secure redress for any existing grievance.

The best and the controlling evidence as to the real intent of the statute is, of course, afforded by the construction placed upon it by the highest court of the state. As thus construed we are able to say of it:

1. It does not authorize an assessment upon the value of to-day, but of the year or years when the lands should have been assessed.

2. It does not authorize an arbitrary assessment.

3. It does not preclude a hearing and correction of an erroneous assessment but makes ample provision for both.

If these propositions are sustained, and that they may be, we hope to abundantly demonstrate, then are the contentions of the plaintiff-in-error futile.

1. In support of the *first* proposition, attention is called to the following language of the supreme court of Minnesota taken from its decision when this case was before it:

"It is true that the act in question merely appoints the county auditor the assessor and makes it his duty to assess the property, without specifically providing on what basis he shall fix its valuation or what means he shall adopt to ascertain it; but it is not to be assumed for the purpose of invalidating the statute that it contemplated or authorized the assessment upon an unconstitutional basis, as, for example, the value of the property to-day. *On the contrary, it must be understood as providing for an assessment upon the only basis that could be lawfully adopted, to-wit, the value of the property at the time the land should have been assessed.* And while the law does not specifically provide what means the auditor shall take to ascertain that fact, yet as it is made his duty to ascertain it, it is also impliedly his duty to adopt such means of doing so as are reasonably within his reach, and from these to exercise his best judgment."

2 and 3. In support of the *second* and *third* propositions we quote the following from the same decision:

"The difficulty in the way of arriving at an exactly accurate result on account of the lapse of time is no fatal objection to the statute. Uniformity as near as may be is all that the statute requires. Moreover, if the auditor, either from mistake or negligence, **makes an unfair or unequal assessment,** *the owner has an opportunity of being heard and having this corrected in the proceedings instituted to obtain judgment against the land,* **and this fact is also an** answer to the suggestion so frequently made by appellant, that the assessment is made arbitrarily by the auditor, without notice or opportunity to be heard on the part of the owner." Id.

Surely, in the face of so clear an exposition of the terms of the statute, argument is quite unnecessary.

In order to fully appreciate the force of the decision of the Minnesota court, as above expressed, the provisions of the statute of that state bearing upon the question should be considered. We therefore insert them here.

1. *List of delinquent taxes to be filed by county auditor on or before June 15th. Filing same has the effect of filing complaint in an action and is notice of pendency thereof.*

"On or before the fifteenth day of June, the county auditor shall file in the office of the clerk of the district court of the county, or if it be attached for judicial purposes to some other county, then in the office of the clerk of such court in that county, a list of the delinquent taxes upon real estate within his county, which list shall contain a description of each piece or parcel of land on which such taxes shall be so delinquent, with the name of the owner if known, and if unknown, so stated, appearing on the delinquent list, and the total amount of tax delinquent and penalty for each year opposite such description, and shall verify such list by his affidavit that the same is a correct list of taxes delinquent, for the year or years therein appearing, upon real estate in said county. The filing of such list shall have the force and effect of filing a complaint in an action by the county against each piece or parcel of land therein described, to enforce payment of the taxes and penalties therein appearing against it, and shall be deemed the institution of such action; and the same shall operate as notice of the pendency of such action." (Gen. Stat. 1878, c. 11, s. 70.)

2. *The clerk within fifteen days to deliver copy to auditor together with notice to owners to file objections.*

"The clerk shall, within fifteen days thereafter, make and deliver to the county auditor a copy of the list so filed, and attach thereto a notice which may be substantially in the following form:

State of Minnesota, County of ..... ss
District Court, ... Judicial District.

The State of Minnesota, to all persons, companies or corporations who have or claim any estate, right, title or interest in, or claim to or lien upon, any of the several pieces or parcels of land in the list hereto attached, described:

The list of taxes and penalties on real estate for the county, remaining delinquent on the first day of June, has been filed in the office of the clerk of the district court of the county of ....., of which that hereto attached is a copy. Therefore you, and each of you, are hereby required to file in the office of said clerk, within twenty days after the last publication of this notice, your answer, in writing, setting forth any objection or defense you may have to the taxes and penalties, or any part thereof, upon any piece or parcel of land described in said list, in, to, or on which you have or claim any estate, right, title, interest, claim or lien.

And in default thereof, judgment will be entered against such piece or parcel of land for the taxes on said list appearing against it, and for all penalties, interest and cost.

(Signed) .....,

Clerk of the District Court in said County of .....

(Here insert list.)" (Id., sec. 71.)

3. *County auditor to publish notice.*

"The county auditor shall cause said notice and list to be published once in each of two consecutive weeks, in some newspaper of general circulation, printed in the English language, and which has been regularly published for at least three months previously, in the county in which said real estate is situate, if there be one, or in the county where the proceedings are instituted, or if there be no such newspaper published in either county, then in some newspaper published within the judicial district, the first publication of which list shall be made within ten days after the delivery thereof to the auditor as provided in the preceding section. The newspaper in which such publication shall be made shall be designated by resolution of the board of county commissioners of the county in which the taxes are levied, at their annual meeting in January or at the meeting of said board in March, a copy of which resolution, certified by the county auditor, shall be filed in the office of the clerk of the court; *provided*, that if the county commissioners shall fail to designate such paper, then it shall be designated by the county auditor." (Id., sec. 72.)

4. *Notice deemed served when last publication made and jurisdiction of court then acquired. Jurisdiction not affected by irregularities occurring prior to filing the delinquent list.*

"When the last publication shall have been made, the notice shall be deemed to have been served and the court to have acquired full and complete jurisdiction to enforce against each piece or parcel of land in said published list described the taxes, accrued penalties and costs upon it then delinquent so as to bind every estate, right, title, interest, claim or lien in law or equity, in, to or on such piece or parcel of land, of every person, company or corporation. And such jurisdiction shall not be in any way affected by any error in making the list filed with the clerk, nor by any error, irregularity or omission in the assessment or levy of the taxes, or in any other proceedings prior to filing the said list, nor by any mistake in copying the list for publication, nor by any mistake in publishing such list, nor by any mistake in the amount of tax in such published list appearing against any piece or parcel of land therein described." (Id., sec. 73.)

5. *Publishers to file affidavit of publication.*

"The owner, publisher, manager or foreman in the printing office of the newspaper in which such notice and list shall be published shall make and file with the clerk an affidavit of such publication, stating the days in which such publication was made, and shall also file with the clerk three copies of each number of the paper and supplement, if any, in which the notice and list shall have appeared. The publication may be made in such newspaper, or partly in such newspaper and partly in a supplement issued therewith." (Id., sec. 74.)

6. *Person having any interest in delinquent tract may file answer within twenty days after last publication, setting forth his defense.*

"Any person, company or corporation, having any estate, right, title, or interest in, or lien upon any piece or parcel of land embraced in said list as published, may, within twenty days after the last publication of said notice, file in the office of the said clerk an answer, verified as pleadings in civil actions, setting forth his defense or objection to the tax or penalty against such piece or parcel of land, which answer need not be in any particular form, but shall clearly refer to the piece or parcel of land intended, and set forth, in ordinary and concise language, the facts constituting the defense or objection to such tax or penalty; and if the list shall embrace the taxes for two or more years, the defense or objections may be to the taxes or penalty for one or more of such years." (Id., sec. 75.)

7. *If answers are filed, they shall stand for trial at general or special term of court — Manner of trials.*

"If answers shall be filed within the time hereinbefore prescribed as to the taxes or penalties upon any pieces or parcels of land embraced in said list as published, such answers shall stand for trial at any general term of the district court in the county where such proceedings are pending, in session at the time when the time to file answers as aforesaid shall expire, or at the next general or special term appointed to be held in said county; and if no general or special term shall be appointed to be held within thirty days thereafter, then the same shall be brought to trial at any general term appointed to be held within the judicial district, upon ten days' notice. It shall be the duty of the county attorney of the county in which said taxes are levied, if there be one, and, if there be none, then of the county in which such proceedings are instituted, to take charge of and prosecute such proceedings; but the county commissioners of the county in which such taxes are levied may employ any other attorney to assist such county attorney therein. At the term at which such proceedings come on for trial, they shall take precedence of all other business before the court. The court shall proceed without delay, and summarily hear and determine the objections or defenses made by the several answers, and shall dispose of all such answers, and direct judgment accordingly at the same term, and in the trial thereof shall disregard all technicalities and matters of form not affecting the substantial merits." (Id., sec. 77.)

8. *Judgment to be rendered if law has been complied with. Certain omissions of officers not a defense. Court may reduce tax. Always defense that taxes have been paid, or that property is not subject to taxation.*

"If all the provisions of law in relation to the assessment and levy of taxes shall have been complied with, of which the list so filed with the clerk shall be *prima facie* evidence, then judgment shall be rendered for such taxes, and the penalties and costs. *But no omission of any of the things by law provided in relation to such assessments and levy, or of anything required by any officer or officers to be done prior to the filing of the list with the clerk, shall be a defense or objection to the taxes appearing upon any piece or parcel of land, unless it be also made to appear to the court that such omission has resulted to the prejudice of the party objecting, and that the taxes against such piece or parcel of land have been partially, unfairly or unequally assessed; and in such case, but no other, the court may reduce the amount of taxes upon such piece or parcel, and give judgment accordingly. It shall always be a defense in such proceedings, when made to appear by answer and proofs, that the taxes have been paid, or that the property is not subject to taxation.*" (Id., sec. 79.)

The most cursory examination of the foregoing provisions in the statutes of this state is sufficient to indicate how completely the owner of property is armed with the power of resisting the payment

of an unjust tax, even in the case of omitted property. It is there clearly provided that relief shall be afforded whenever it is made to appear to the court that through the omissions of the taxing officers the owner of property has been prejudiced or the taxes against his property "*have been partially, unfairly or unequally assessed.*" In such case it is expressly provided that "the court *may reduce the amount of taxes* upon such piece or parcel and give judgment accordingly." (See section 79, *supra.*)

A somewhat recent decision of the supreme court of Minnesota construing section 79, *supra*, sheds important light upon the meaning of that section.

"It may safely be concluded that under this law, recognizing the right to defend in respect to taxes 'partially, unfairly or unequally assessed,' it was contemplated that a property owner might show in defense or in reduction of the tax charged upon its property that the requirement of a *bona fide* assessment had been intentionally disregarded by the taxing officers to the prejudice of such land-owner. We go further, and hold, as was considered in respect to special assessments under a city charter in *State* vs. *Board of Public Works of St. Paul*, 27 Minn. 442, and *State* vs. *District Court of Ramsey County*, 29 Minn. 62, that, even though no intentional fraud be proved, it may be shown in defense that the error in the assessment was so gross that it cannot be accounted for upon any ground of mere misjudgment of value, but must have resulted, if not from fraud, from what in the case first cited above was called a 'demonstrable mistake of fact.' By proof of this nature it would be possible to show very clearly that there had really been no assessment of the property in question, and that the valuation on the assessment roll did not express any estimate or opinion of the assessor as to the value of the property."

County of Otter Tail vs. *Batchelder*, 47 Minn. 516.

And again, in the case now before this court, the Minnesota court said in reply to the contention of the learned counsel in respect to the said section:

"Without following counsel through their exhaustive arguments * * * it is sufficient to say that it seems to proceed upon what we consider two false assumptions: * * * *Second, that* under the tax law (Gen. St. 1878, c. 11, secs. 75, 79) *the defenses* which he may interpose by answer, when the state applies for judgment, *are so restricted as not to include all the objections which go to the merits of the proceedings.* Where, as in the present case, the tax is levied on

property, not specifically, but according to its value to be ascertained by some person appointed for that purpose, undoubtedly a party is entitled to notice and an opportunity to be heard; but we know of no case where it was ever held that a party was entitled to notice of, and to be heard in, each step in tax proceedings as it is taken. We doubt whether any tax law ever provided for any such thing. The principle running through all the cases is that a law does not infringe upon the constitutional provision under consideration if the property-owner has an opportunity to question the validity or amount of the tax *either before that amount is determined, or in subsequent proceedings for its enforcement.* Whenever by law a tax is imposed upon property, and those laws provide for a mode of confirming or contesting it in the ordinary courts of justice, with such notice to the person or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law. *Davidson* vs. *New Orleans*, 96 U. S. 97; *Hagar* vs. *Reclamation District*, 111 U. S. 701.

"This right is fully given under the sections of the law already referred to. Within twenty days after the last publication of the delinquent list any person may by answer interpose any defense or objection he may have to the tax. He may set up as a defense that the tax is void for want of authority to levy it, or that it was partially, unfairly or unequally assessed. *Commissioners of St. Louis Co.* vs. *Nettleton*, 22 Minn. 356. He may set up as a defense *pro tanto* that a part of the tax has not been remitted, as required by some statutes. *Commrs. of Houston Co.* vs. *Jessup*, Id. 552. That the land is exempt, or that the tax has been paid. *County of Chisago* vs. *St. Paul & Duluth R. Co.*, 27 Minn. 109. That there was no authority to levy the tax, or that the special facts authorizing the insertion of taxes for past years in the list did not exist, or any omissions in the proceedings prior to filing the list, resulting to his prejudice. *County of Olmsted* vs. *Barber*, 31 Minn. 256. The filing of the list is the institution of an action against each tract of land described in it, for the recovery of the taxes appearing in the list against such tract, and tenders an issued on every fact necessary to the validity of such taxes. *Chauncey* vs. *Wass*, 35 Minn. 1. The only limitation or restriction upon the defenses or objections which may be interposed is that contained in section 79, to the effect that if a party interposes as a defense an omission of any of the things provided by law in relation to the assessment or levy of a tax, or of anything required by any officer to be done prior to filing the list with the clerk, the burden is on him to show that such omission has resulted in prejudice to him, and that the taxes have been partially, unfairly or unequally assessed."

County of Redwood vs. *W. & St. P. Land Co., supra*, 518.

It is therefore seen that the law of 1881, as construed by the supreme court of Minnesota in connection with other provisions of the tax laws of that state, does not deprive the owner of omitted property of any substantial right. There remains to him the adequate right of a day in court. With this assurance, there is no question for the consideration of this court within the rule adopted and followed by it in the numerous decisions hereinbefore cited.

The views urged by the defendant-in-error in this regard find support in several of the decisions of this court from which the following expressions are quoted:

"Whenever, by the laws of this state or by state authority a tax, assessment, servitude or other burden is imposed upon property for the public use, whether it be of the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice, with such notice to the person of such proceeding in regard to the property as is appropriate to the nature of the case, judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections."

Davidson vs. *New Orleans*, 96 U. S. 104.

"It is not possible to hold that a party has without due process of law been deprived of his property when as regards the issues affecting it he has by the law of the state a fair trial in a court of justice according to the mode of proceeding applicable to such a case." (Id.)

"By due process of law is meant one which following the forms of law is appropriate to the case and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by law. It must be adapted to the end to be attained, and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought."

Hagar vs. *Reclamation Dist.* 111 U. S. 708.

"Undoubtedly where life and liberty are involved, due process requires that there be a regular course of judicial proceedings which imply that the party to be affected shall have notice and an opportunity to be heard; so also where title or possession of property is involved, *but where the taking of property is in the enforcement of a tax, the proceeding is necessarily less formal*, and whether notice to him is at all necessary may depend upon the character of the tax and the manner in which its amount is determinable." (Id.)

"It has, however, been repeatedly decided by this court that the proceedings to raise the public revenue by levying and collecting taxes are not necessarily judicial, and that due process of law as applied to that subject does not imply or require the right to such notice and hearing as are considered to be essential to the validity of the proceedings and judgments of judicial tribunals. Notice by statute is generally the only notice given and that has been held sufficient."

Kentucky R. R. Cases, 115 U. S. 331.

"In its application to proceedings for the levy and collection of taxes it was said in *McMillen* vs. *Anderson*, 95 U. S. 37, 42, that 'it is not and never has been considered necessary to the validity of a tax that the party charged should have been present or have an opportunity to be present in some tribunal where he was assessed.' This language, it is true, was used in the decision of a case in reference to a license tax, where all the circumstances of its assessment were declared by statute, and nothing was intrusted to the discretion of public officers; but in the State Railroad Cases, 92 U. S. 575, where the ascertainment of the taxable value of railroads was the duty of a board, as in the present cases, whose assessment was challenged for the reason that the proceeding was not 'due process of law' for want of notice and a hearing, it was said by Mr. Justice Miller, delivering the opinion of the court: 'This board has its time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right or redress a wrong; and in the business of assessing taxes, this is all that can be reasonably asked.'"

Kentucky R. R. Cases, supra.

"The notice need not be a personal citation; it is sufficient if it be given by a law designating the time and place where parties may contest the justice of the valuation. As a general rule only a statutory notice is given. The state may designate the kind of notice and the manner in which it shall be given. All that we assert or have asserted is, that there must be a notice of some kind which will call the attention of parties to the subject and inform them *when and where they will be permitted to expose any alleged wrong in the valuation of which they may complain.*"

County of Santa Clara vs. *Southern R. Co.*, 18 Fed. Rep. 410.

"The remedy for abuse is in the state courts, for, in the language of Mr. Justice Field in *Mobile* vs. *Kimball*, 'this court is not the harbor in which the people of a city or county can find a refuge from ill-advised, unequal and oppressive state legislation.'"

Walston vs. *Nevin*, 128 U. S. 578.

"The purpose of the constitutional provision in question is to exclude everything which is arbitrary and capricious in legislation affecting the rights of the citizen. They are aimed against purely personal arbitrary power."

Dent vs. *W. Virginia*, 129 U. S. 124.
Wick Wo vs. *Hopkins*, 118 U. S. 356.

IV.

It is competent for the legislature to provide for the taxation of omitted property.

It was urged by the plaintiff-in-error before the supreme court of Minnesota, and it is assumed that the same contention will be urged upon this appeal, that taxes cannot be raised upon omitted property, for the reason that the expenses of government have been met and that therefore no proper use therefor exists. It was also urged that such taxation is "extortion and confiscation;" and that the act of 1881 is not a remedial statute.

The courts would seem to have adopted the opposite view.

In *Fairfield* vs. *The People*, 94 Ill. 244, the court say:

"It is by our constitution a cardinal principle of taxation that all shall contribute to raising revenue for governmental purposes in proportion to the value of their property. It was the duty of these objectors to have thus contributed to the municipal expenses of the city in the years 1873 and 1874.

"The enforcement of this duty was entered upon by the attempted levy and collection of taxes for those years on their property, and failed only from an irregularity in the mode of procedure. What if the expenses of those years have been paid and satisfied? It was from the taxation of others, and not from any contribution made by the objectors. Their taxes remaining uncollected, the result would be that they would escape the payment of their just proportion toward the maintenance of municipal government, while others would bear more than their proportion of it. In avoidance of such injustice, and in assertion of the constitutional principle of equality of taxation, was the enactment of 1877. The act merely provides that what might and should then, in the former years, have been done, may now be done. The taxes were at the time, in 1873 and 1874, authorized in the respect of having the basis of a corporate purpose to sustain them. Because the taxes are not now needed for, and will not be applied to, the particular corporate purpose for which they were required at the time they were attempted to be levied and collected, the municipal expenses of 1873 and 1874, it does not follow that

when collected they will not be applied to some municipal purpose. They would belong to the corporation, and would, like any other surplus, remain in the treasury subject to future appropriations for municipal purposes, and thereby lighten future taxation and thus operate in the equalization of the burden of taxation. In *Village of Hyde Park* vs. *Ingalls, et al.*, 87 Ill. 11, where there was an item of some $22,000 in the tax levy of the village to pay expense of collection and deficiencies in collection, this court, in answer to an objection to this item, said: 'A surplus may undoubtedly be brought into the treasury by this mode of levying, but it will not be lost. It will belong to the corporation, and may be used in extinguishing other debts or in the payment of current expenses, and thereby lighten future taxation.'"

In *Tallman* vs. *City of Janesville*, 17 Wis. 73, the court say:

"Cannot the legislature pass such laws as it may from time to time find necessary to cure defects in existing laws for raising revenue, whenever they are discovered, and make the assessment of taxes as nearly equal as possible? This is all the legislature really attempted to do by passing this law for the purpose of curing the invalidity in the previous tax proceedings. The former discrimination under the charter, it was contended, produced a gross inequality in the imposition of taxes, and violated the rule of uniformity prescribed by the constitution; and when this view was sustained by this court, the necessity for a readjustment and relevying of taxes for the previous years became apparent. There does not seem to be anything very extraordinary or unusual in such legislation; indeed we should think the taxing power was defective if it could not be exercised to cure such errors. The taxes for the four previous years having been declared void, the financial embarrassments of the city must have been insuperable, unless the legislature could grant some relief. The remedy afforded was permission for a reassessment of the taxes in order to make all property contribute equally to the support of the government. Those citizens who had paid their taxes were credited with that payment upon the reassessment of their property, and delinquent taxpayers had no just ground of complaint because they were made to contribute their proper proportion to the public burdens.

"The law is, however, severely denounced because it provides for levying a tax upon lands for the years 1854, 1855, 1856 and 1857, which had been purchased by the respondents of the former delinquent tax owners for a full and valuable price paid since, and which, when purchased, were not subject to any lien or charge. To impose the taxes now for those years, it is claimed, is productive of great injustice and oppression. There is doubtless some force in this objection, and yet, because the law operates harshly in some cases, we

cannot declare it void if it is a proper exercise of the taxing power. Almost every system of taxation operates more or less unequally and works injustice in individual cases. The objection here taken would lie with equal force against the provision of the revised statutes which authorizes the assessor, upon discovering that any land liable to taxation in his town was omitted in the assessment roll of either or both the two previous years, to assess the same for those years it was omitted, in order that the taxes, to the amount which should have been paid in the years of such omission, may be imposed and collected. Sec. 25, ch. 15, R. S. 1849; sec. 27, ch. 18, R. S. 1858. Under these provisions it is very apparent a tax might be levied and collected upon lands which had by purchase become the property of persons other than those who owned them when the tax should have been paid. Undoubtedly, analogous provisions will be found in many other revenue laws of our sister states, which inevitably operate oppressively in individual cases. And still this power of correcting defective assessment rolls, on the part of the public authorities, is a salutary and highly beneficial feature of our systems of taxation. It is not to be abandoned because in some instances it produces individual hardships. Every taxpayer is interested in having the property list as perfect as possible, and therefore power to correct omissions and inequalities in the rolls is intrusted to some of the taxing officers. Again, the respondents must be assumed to have known when they purchased these lands that the taxes formerly assessed against them had been declared void, and they purchased with full knowledge of the power of the legislature to provide for a reassessment of them. True, they might not have known that the legislature would exercise this power, but they took this risk. And whatever laws the legislature might pass, within the limitations of the constitution, to correct the previous defective proceedings in assessing taxes, they must submit to."

In *Cross* vs. *City of Milwaukee*, 19 Wis. 344, the court reaffirms the doctrine announced in *Tallman* vs. *City of Janesville*, *supra*, and further say:

"The legislature of this state has plenary power over the subject of taxation so long as it does not violate the principle of uniformity, and may, we think, prescribe the mode of correcting an informal assessment. It was so decided in the Tallman case, and we are satisfied with the rule there laid down upon this subject. Indeed, as we there said, this power of correcting defective assessment rolls is a highly beneficial feature of our system of taxation, and we should think the taxing powers of the government very defective if it could not be extended to cure such errors."

In New York the court not only sustains the authority of the legislature to provide for a reassessment of property, but goes to the

extent of holding, that, in the case of a void assessment, the legislature itself may make the assessment. Thus, in matter of *Van Antwerp*, 56 N. Y. 261, the court say:

"It is also objected that it is not competent for the legislature to validate a void assessment, and that it could only authorize a reassessment. The answer to this is that the legislature did not attempt to legalize the old assessments, but itself exercised the power of making new assessments. The old assessments are referred to, not for the purpose of adoption but for the purpose of fixing the specific amount by the proportion specified; and the act expressly levies that amount *as a tax*. It is as certain as if the particular sum was specified. The legislature, in effect, has declared that the petitioner shall pay a specified sum upon his property described, toward defraying the expenses of repaving St. Felix street, adjacent to which his property is located; and it has imposed a like burden upon property similarly situated. It was conceded, on the argument, that the legislature might have authorized a reassessment. If so, it is clear that it could make the reassessment itself; and this is precisely what it did by the act of 1872. Whatever the legislature may authorize to be done by a municipal corporation, it may do itself directly; and it is no objection that the improvement has been made and expenses incurred. (37 N. Y. 267).

"The act in question does not interfere with any vested right or cause of action of the petitioner to set aside the original assessment."

Spencer vs. *Merchant*, 100 N. Y. 586.

In *Overing* vs. *Foote*, 43 N. Y. 290, property had been taxed to the wrong person in 1864, and it was thereupon placed upon the tax list in 1865 for the omitted year. It certainly is a question of no importance, so far as the principle is concerned, whether the omission occurred one or several years before the discovery thereof. If the legislature may provide for corrections of such omissions in the one case, it may also in the other.

In *People* vs. *Board of Assessors*, 92 N. Y. 430, we have a case on all fours with that of *Overing* vs. *Foote*. There the omission occurred in 1880 and was corrected in 1881, under the same statute involved in the Overing case. The statute merely provided that it should be the duty of the assessors, "upon the application of any three tax-payers in said town, city or ward, who shall consider themselves aggrieved, to enter said land or property in the assessment roll of the current year, at the valuation of the year in which said tax was omitted, or, *if not then valued* at the valuation of the preceding

year, in a separate line from the valuation of the current year." No provision whatever was made for notice or hearing, and in this respect it was not unlike the statute of Minnesota in question. It was objected in that case that the act was for that reason invalid. The court held, however, that the statute "must be read and construed in connection with the general system of which it forms a part." The court further held, in line with the decision of the Minnesota court in the case at bar, that it cannot be said "that the act of 1865 requires that the property of the relator be taken without notice or an opportunity to be heard."

Nor is this principle affected by what is said in *Overing* vs. *Foote*, 65 N. Y. 263. It was there held that the assessment was void because it had not been made within the time prescribed by law. And the judge who wrote the opinion of the court says:

"I find nothing in the act of 1865 which requires any special notice to be given of the reassessment of omitted taxes for the previous year, or any special provision for the hearing of any party aggrieved. The act says that, 'whenever it shall appear to the assessors' that an omission mentioned in the act has been made, they may assess the omitted property for the then current year, but I cannot suppose it was intended that this might be done without some form of notice, and as none is provided for in the act, some reference was intended to be had to the general laws relating to that subject. It was obviously contemplated that the petition in such cases must be presented when the assessors had power to put the names of tax-payers upon the roll for the current year, and not after they had lost all power to amend the assessment roll by adding names or property of any kind whatever. I therefore conclude that this attempted assessment was void."

A statute has long existed in the state of Illinois providing for the assessment of omitted property, which is substantially like that of Minnesota upon the same subject. So identical is it with the latter statute that its reproduction here will serve to demonstrate that Minnesota has not at least in this respect, adopted anomalous legislation:

"If any real or personal property shall be omitted in the assessment of any year or number of years or the tax thereon, for which such property was liable, from any cause has not been paid, or if any such property, by reason of defective description or assessment thereof, shall fail to pay taxes for any year or years, in either case the

same, when discovered, shall be listed and assessed by the assessor and placed on the assessment and tax books. The arrearages of tax which might have been assessed, with ten per cent interest thereon, from the time the same ought to have been paid, shall be charged against such property by the county clerk. It shall be the duty of county clerks to add uncollected personal property tax to the tax of any subsequent year, whenever they may find the person owing such uncollected tax assessed for any subsequent year." Rev. Stat. Ill., chap. 120, sec. 276.

It will be seen that all the criticisms so strenuously urged by the learned counsel for the plaintiff-in-error against the statute of Minnesota apply with equal force to that of Illinois.

It is significant that the validity of the statute of Illinois has never been questioned, although frequent cases must have arisen under it since its enactment many years ago, and it has on several occasions been brought to the attention of the highest court of that state.

In *Allwood* vs. *Cowen*, 111 Ill. 481, the plaintiff sought to enjoin the collection of a tax, but no question was raised as to the validity of the statute under which the assessment was made. It was also brought to the attention of the court in the following cases:

Neff vs. *Smyth*, 111 Ill. 100.

O. & M. Ry. Co. vs. *People*, 123 Ill. 648.

A similar statute is in existence in Tennessee (Acts of Tenn. 1879, chap. 79), and was not questioned in *Shelby County* vs. *Rd. Co.*, 16 Lea, 401.

The foregoing authorities would seem to completely negative the contention of the plaintiff-in-error that taxes cannot be raised upon omitted property because amounting to "extortion and confiscation."

V.

The presumption is that the county auditor adopted and pursued appropriate means in assessing the lands.

While the law does not specifically provide what means the auditor shall take to ascertain that fact (the valuation), yet, as it is made his duty to ascertain it, it is impliedly his duty to adopt such means of doing so as are reasonably within his reach, and from them to exercise his best judgment.

County of Redwood vs. *W. & St. Peter Land Co.*, 40 M. 520.

Transcript of Record, p. 7, folio 14.

The authorities are unanimous to the effect that taxes shall be presumed legally assessed until the contrary is affirmatively shown.

Hunt vs. *Chapin*, 42 Mich. 25.

Buck vs. *People*, 78 Ill. 560.

New Orleans vs. *Banking Co.*, 99 U. S. 97.

The assessment of the property on the assessment rolls and the methods of valuation are presumed correct until the contrary is proved, and the burden is on the petitioner, in proceedings to vacate an assessment, to establish the irregularity or illegality.

VI.

Not only is the presumption as above expressed, but the fact is, as determined by the findings of the District Court of Minnesota, that the county auditor properly performed his duty.

The certificate of the district court (transcript of record, pages 16 to 20) contains the following:

"Fourth. That said lands described in said answer having been omitted in the assessment of taxes for all prior years and having thereby escaped taxation for all years prior to 1886, the county auditor of said county properly entered the same on the assessment and tax books and properly assessed the same and extended all arrearages of taxes which had accrued against the same, and that the tax and penalty named in said delinquent list against each piece and parcel of land described in the defendant's answer except those tracts mentioned in the fourth paragraph thereof has been impartially, fairly, and equally assesesd by said auditor for each of the years named in said list."

It is, therefore, respectfully submitted that the judgment of the supreme court of Minnesota should be affirmed.

Respectfully sumbitted,

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